U.S. Department of Justice

Antitrust Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

DEC 1 1992

James R. Loftis, III, Esquire
Collier, Shannon, Rill & Scott
3050 K Street, N.W.
Washington, D.C. 20007

Re: Business Review Request: Super Efficient Refrigerator Program

Dear Mr. Loftis:

This letter responds to your request for a statement by the Department of Justice, pursuant to the Business Review Procedure, 28 C.F.R. § 50.6, of its enforcement intentions with respect to the proposal by Super Efficient Refrigerator Program ("SERP") to provide a financial incentive to a manufacturer that develops and markets models of more energy-efficient residential refrigerators that have refrigerant and insulation free of chloroflurocarbons ("CFCs"). Under SERP's proposed program, each member of SERP has contributed or committed to contribute funds that will total approximately $30 million to be used as a payment to the manufacturer that wins SERP's competitive bid program. By creating this incentive, SERP hopes to advance the development of more efficient, CFC-free refrigerators, bringing them to market years ahead of normal market expectations. SERP's proposed program focuses on residential refrigerators because they account for over 22 percent of total residential electricity consumption and have a useful life expectancy of approximately 20 years; hence any improvements in efficiency are expected to result in considerable savings in energy use.

SERP, a corporation comprised principally of electric utilities, has been working with the Environmental Protection Agency and environmental and utility organizations to advance technology designed to reduce energy consumption. At present, SERP has 24 members that include investor-owned and municipal electric utilities and a federal power authority. SERP is continuing to solicit members, such as rural electric cooperatives, and will remain open to other members on the same terms as its current members. SERP also has created a class of associate members that would consist of research and development entities. Although manufacturers and other

entities were individually consulted about the proposed program, you have represented that the SERP proposal as submitted to the Department was ultimately devised and agreed upon solely by SERP's Board of Directors.

Eligible bidders include any person that currently manufactures or assembles full size residential refrigerators in North America, or proposes to develop such a facility that will be capable of mass production and distribution. Minimum bidding requirements include a certification that the new refrigerators will be CFC-free and at least 25 percent more energy efficient than those meeting the 1993 standards of the U.S. Department of Energy under the National Appliance Energy Conservation Act of 1987. Eligible bidders must state the minimum number of units that will be tendered for sale and delivery into SERP member service areas, and must agree to make deliveries to these service territories on a pro rata basis according to the financial commitments made by SERP members. In order to receive the incentive payments, they must also certify that the price at which they will sell the more efficient models to wholesalers will not be higher than the price at which they sell their own comparable models. There are no other restrictions on prices. Thus, there will be no actual or implied limits on retailers as to how, when, or to whom they will sell, or the price at which they will sell.

A single winner will be selected on the basis of a variety of factors, including projected energy efficiency, overall quality of design, experience and commitment, a demonstrated ability to manufacture on a volume basis and the promptness with which the new product can be brought to market. SERP may select a winner after the initial round of bids, or may conduct a prototype run-off competition between the two best bids. SERP hopes to select a winner by December 31, 1992; that winner would deliver prototypes for testing by May 1, 1993. For each new super efficient refrigerator that the winning manufacturer sells to customers prior to the closing date of July 1, 1997, the winning bidder will receive a payment. SERP estimates that, for producing approximately 300,000 units, the incentive will be about $100 per unit. Participation in this program does not preclude SERP members from participating in any other incentive program.

We further understand that SERP's members want to ensure that their contributions to the incentive fund will provide benefits within their respective regions. For this reason, SERP has made provisions for sales of units that are sold in the service area of one utility but are used in another's service area. Bidders will be required to establish a system to keep track of names and addresses of at least 25 percent of the retail customers on a monthly basis. (Ten percent of the incentive payments will be withheld until this information is received.) About four percent of each member's contribution will be put into a fund to mitigate the effect of "cross-border" sales. While it will monitor cross-border sales

and will provide incentive payments for refrigerators delivered in the service areas of a SERP member, SERP imposes no other limits or restrictions on any manufacturer as to where it may market super efficient refrigerators.

After careful consideration of the information you have provided, the Department has concluded that it has no present intention of challenging SERP's super efficient refrigerator proposal, as set out in this letter, on antitrust grounds. While the Department would be concerned if the effect of the proposed conduct were to increase the likelihood that SERP's members or the manufacturers bidding for SERP's program could successfully coordinate their interactions, such as by express or tacit collusion on pricing, the Department has concluded that the proposed program is unlikely to have such an effect. Actual or prospective members of SERP generally do not compete for residential customers and in any event their limited cooperation in SERP would not facilitate collusion in utility markets. Also, since SERP members are not precluded from participating in other programs relating to the development of energy-efficient appliances, competition in that research and development market would not be affected. Finally, SERP is not likely adversely to affect competition in the market for refrigerator manufacturing. The program provides for independent competitive responses by refrigerator manufacturers. Opportunities for collusion among manufacturers resulting from the program are minimal.

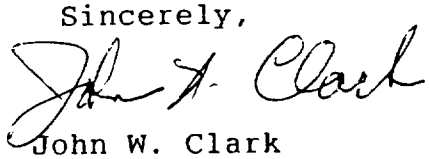
There also appears to be a procompetitive justification for this proposal. If implemented, the proposal may accelerate research and development in the design, production and marketing of more energy-efficient residential refrigerators and may increase and enhance competition generally in the marketing and sale of such appliances.

This letter expresses the Department's current enforcement intention only. In accordance with our normal practices, however, the Department remains free to bring whatever action or proceeding it subsequently comes to believe is required by the public interest if actual operation of any aspect of the program proves anticompetitive in purpose or effect.

This statement of the Department's enforcement intentions is made in accordance with the Department's Business Review Procedure, 28 C.F.R. § 50.6, a copy of which is enclosed. Pursuant to its terms, your business review request and this letter will be made available to the public within 30 days of

the date of this letter unless you request that part of the material be withheld in accordance with Paragraph 10(c) of the Business Review Procedure.

Sincerely,



John W. Clark
Acting Assistant Attorney General

Enclosure